

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

11 DAVID A. JOYCE,)
12 Petitioner,)
13 vs.)
14 DWIGHT NEVEN, *et al.*,)
15 Respondents.)
/

2:12-cv-02216-RFB-NJK
ORDER

17 Before the court for a decision on the merits is an application for a writ of habeas corpus
18 filed by David A. Joyce, a Nevada prisoner. (ECF No. 8.)

I. BACKGROUND¹

On May 7, 2008, a jury sitting in the state district court for Clark County, Nevada, found Joyce guilty of burglary. The jury acquitted Joyce on a charge of robbery. On July 8, 2008, the court sentenced Joyce under the habitual criminal statute to a term of twenty years with parole eligibility after eight years. The judgment of conviction was entered on July 21, 2008. Joyce appealed.

¹ Except where indicated otherwise, this case history is derived from the exhibits filed under ECF Nos. 17-22 and from this court's own docket entries.

1 On May 29, 2009, the Nevada Supreme Court affirmed the judgment of conviction. The
2 Nevada Supreme Court recounted the facts supporting the conviction as follows:

3 On September 27, 2007, appellant David Anthony Joyce and another
4 individual entered a K-Mart located in Las Vegas, Nevada. The two immediately
5 drew the attention of Brian Adams, a Loss Prevention Specialist for K-Mart. Adams
6 monitored Joyce on the store's surveillance system and watched as he picked up an
7 electronic toothbrush. Adams then observed Joyce as he stuffed the electronic
8 toothbrush down the front of his pants.

9 As Joyce was leaving the store, Adams contacted his supervisor, Emma
10 Dowdy, who reviewed the surveillance videotape. After confirming that Joyce was
11 indeed concealing an electronic toothbrush in the front of his pants, Adams and
12 Dowdy approached Joyce in the parking lot. Dowdy told Joyce that he had been
13 caught stealing and needed to return to the store. Joyce refused and left the scene.
14 After Adams and Dowdy positively identified Joyce from a photographic lineup, the
15 police effectuated his arrest.

16 On April 28, 2010, Joyce filed a post-conviction habeas petition in the state district court.
17 The state district court denied the habeas petition, entering written findings of fact and conclusions
18 of law on August 26, 2010. Joyce appealed.

19 On May 10, 2011, the Nevada Supreme Court affirmed in part and reversed in part the
20 judgment of the state district court. The court concluded that the lower court had erred by not
21 holding an evidentiary hearing on one of Joyce's ineffective assistance of counsel (IAC) claims and
22 remanded the case for that purpose.

23 After holding an evidentiary hearing, the state district court denied relief and entered, on
24 January 25, 2012, written findings of fact and conclusions of law. Joyce appealed. On June 14,
25 2012, the Nevada Supreme Court affirmed the lower court's decision in all respects.

26 In December 2012 Joyce initiated this federal habeas proceeding. Respondents filed an
27 answer to Joyce's petition on March 10, 2014. Joyce did not file a reply.

28 **II. STANDARDS OF REVIEW**

29 This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28
30 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

1 An application for a writ of habeas corpus on behalf of a person in custody pursuant
2 to the judgment of a State court shall not be granted with respect to any claim that
3 was adjudicated on the merits in State court proceedings unless the adjudication of
the claim -

4 (1) resulted in a decision that was contrary to, or involved an unreasonable
application of, clearly established Federal law, as determined by the Supreme Court
of the United States; or

5 (2) resulted in a decision that was based on an unreasonable determination of the
facts in light of the evidence presented in the State court proceeding.

6
7 28 U.S.C. § 2254(d).

8 A decision of a state court is "contrary to" clearly established federal law if the state court
9 arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the
10 state court decides a case differently than the Supreme Court has on a set of materially
11 indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable
12 application" occurs when "a state-court decision unreasonably applies the law of [the Supreme
13 Court] to the facts of a prisoner's case." *Id.* at 409. "[A] federal habeas court may not "issue the writ
14 simply because that court concludes in its independent judgment that the relevant state-court
15 decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

16 The Supreme Court has explained that "[a] federal court's collateral review of a state-court
17 decision must be consistent with the respect due state courts in our federal system." *Miller-El v.*
18 *Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for
19 evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the
20 doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7
21 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination
22 that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'
23 on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011)
24 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized
25 "that even a strong case for relief does not mean the state court's contrary conclusion was

1 unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v.*
2 *Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and
3 highly deferential standard for evaluating state-court rulings, which demands that state-court
4 decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

5 The state court's factual findings are presumed to be correct unless rebutted by the petitioner
6 by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465,
7 473-74 (2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court
8 that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. In *Pinholster*, the Court
9 reasoned that the "backward-looking language" present in § 2254(d)(1) "requires an examination of
10 the state-court decision at the time it was made," and, therefore, the record under review must be
11 "limited to the record in existence at that same time, i.e., the record before the state court." *Id.* at
12 182.

13 **III. DISCUSSION**

14 All four grounds in Joyce's petition allege he was deprived of his constitutional right to
15 effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984), provides the federal
16 law standard for analyzing a claim of ineffective assistance of counsel. Under *Strickland*, the
17 petitioner must show that (1) "counsel made errors so serious that counsel was not functioning as the
18 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's errors "deprive[d]
19 the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The first *Strickland* prong
20 asks whether an attorney's performance fell below an objective standard of reasonableness. *Id.* at
21 687-88. The second prong requires the petitioner to "show that there is a reasonable probability that,
22 but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*
23 at 694.

24 **A. *Ground 1***

25
26

1 In Ground 1, Joyce claims that he received ineffective assistance of counsel, in violation of
2 his constitutional rights, because his counsel failed to adequately review discovery for the purposes
3 of developing a viable defense to the burglary charge. ECF No. 8, p. 6-9.² According to Joyce,
4 counsel should have developed a defense based on the fact that Joyce and his friend made a valid
5 purchase while in the store, which could have been used to disprove the element of intent. *Id.* He
6 further claims that counsel should have presented a defense based on lack of motive. *Id.*

7 Joyce presented this claim to the Nevada courts in his first state post-conviction proceeding.
8 ECF No. 20-10, p. 19-22. The Nevada Supreme Court analyzed the claim under *Strickland*. ECF
9 No. 21-15, p. 2-3. In denying the claim, the court stated as follows:

10 [A]ppellant claimed that counsel was ineffective for failing to use appellant's
11 purchase of some merchandise to disprove that he had motive and intent to commit
12 burglary. Appellant failed to demonstrate deficiency or prejudice. The undisputed
13 evidence at trial was that appellant purchased some items, and counsel highlighted
14 that fact in closing arguments. Further, appellant's claim that there were other facts
15 counsel should have used to disprove motive and intent is a bare, naked claim
16 unsupported by specific information. See Hargrove v. State, 100 Nev. 498, 502-03,
17 686 P.2d 222, 225 (1984). Moreover, as the crime of burglary is committed when a
18 person enters a building with the necessary intent, NRS 205.060; State v. Adams, 94
19 Nev. 503, 505, 581 P.2d 868, 869 (1978), later paying for some merchandise does not
20 necessarily disprove the intent upon entry. We therefore conclude that the district
21 court did not err in denying this claim.
22

23 *Id.*

24 The Nevada Supreme Court applied the correct federal law standard to the claim. Joyce has
25 not shown that the court's application of that standard was unreasonable or that the court's
26 adjudication of the claim resulted in a decision based on an unreasonable determination of the facts.
Accordingly, under § 28 U.S.C. 2254(d), this court must defer to the Nevada court's denial of the
claim.

27 Ground 1 is denied.

28 ² References to page numbers for documents filed electronically are based on CM/ECF
29 pagination.
30

1 **B. Ground 2**

2 In Ground 2, Joyce claims that he received ineffective assistance of counsel, in violation of
3 his constitutional rights, because his counsel focused too much attention on the robbery charge, at
4 the expense of preparing to defend the burglary charge. ECF No. 8, p. 11-13. In particular, Joyce
5 alleges that counsel should have presented evidence demonstrating that Joyce was “doing nothing
6 more than adjusting, and pulling up his shorts” and should have placed more emphasis on the fact
7 that the store’s security alarm did not sound despite the merchandise being wrapped in theft
8 prevention packaging. *Id.*

9 Joyce presented this claim to the Nevada courts in his first state post-conviction proceeding.
10 ECF No. 20-10, p. 22-24. The Nevada Supreme Court analyzed the claim under *Strickland*. ECF
11 No. 21-15, p. 2-3. In denying the claim, the court stated as follows:

12 [A]ppellant claimed that counsel was ineffective for not adequately stressing
13 the significance of the store’s security devices in relation to the burglary charge.
14 Appellant failed to demonstrate deficiency or prejudice. Appellant’s claim was belied
15 by the record as counsel argued extensively in closing remarks that the State had not
16 proven burglary because the surveillance video did not clearly show appellant
secreting any merchandise and that despite all of the security devices on the item in
question, appellant triggered no security alarms. See *Hargrove*, 100 Nev. at 502–03,
686 P.2d at 225. We therefore conclude that the district court did not err in denying
this claim.

17 *Id.*

18 The Nevada Supreme Court applied the correct federal law standard to the claim. Joyce has
19 not shown that the court’s application of that standard was unreasonable or that the court’s
20 adjudication of the claim resulted in a decision based on an unreasonable determination of the facts.
21 Accordingly, under § 28 U.S.C. 2254(d), this court must defer to the Nevada court’s denial of the
22 claim.

23 Ground 2 is denied.

24

25 **C. Ground 3**

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In Ground 3, Joyce claims that he received ineffective assistance of counsel, in violation of his constitutional rights, because his counsel failed to prevent the trial court's habitual criminal adjudication. ECF No. 8, p. 15-18. In support of this claim, Joyce contends that his sentence is excessively disproportionate to the crime, which consisted of the theft of a \$130.00 electronic toothbrush, and a violation of his constitutional right to be free from cruel and unusual punishment. *Id.* He further alleges that the prosecution presented a certified copy for only one prior conviction.

7 || *Id.*

In deciding Joyce's direct appeal, the Nevada Supreme Court addressed Joyce's argument that the trial court erred in applying the habitual criminal statute to his sentence. ECF No. 19-27, p. 7-8. The Nevada Supreme Court stated as follows:

Habitual criminal statute

Joyce contends that the district court abused its discretion in applying the habitual criminal statute because his prior convictions arose out of a single criminal episode and were stale and old. See Sessions v. State, 106 Nev. 186, 190-91, 789 P.2d 1242, 1244-45(1990). Nevada's habitual criminal statute provides that any person who is convicted of a felony in this state, who has previously been convicted of two other felonies in any state, may be adjudged a habitual criminal. NRS 207.010(1)(a). This court has further provided that it is within the discretion of the district court to sentence a defendant under the small habitual criminal statute rather than the large habitual criminal statute if the circumstances so warrant. [FN: *Sentences imposed under the major habitual criminal statute must be life sentences with or without parole; sentences pronounced under the minor habitual criminal statute may be not less than ten years nor more than twenty years.* See NRS 207.010(1)(a)-(b).] Staley v. State, 106 Nev. 75, 78, 787 P.2d 396, 397 (1990) overruled on other grounds by Hodges v. State, 119 Nev. 479, 483-84, 78 P.3d 67, 69-70 (2003).

Here, the State submitted six prior convictions for the district court to use in adjudicating Joyce as a habitual criminal. These convictions arose out of at least three separate criminal transactions. Furthermore, all of Joyce's prior convictions were less than 20 years old. See *Tanksley v. State*, 113 Nev. 997, 1003-04, 946 P.2d 148, 152 (1997) (concluding that the district court did not abuse its discretion in applying the habitual criminal statute to a defendant with prior felonies that were less than 20 years old). Therefore, we conclude that the district court properly adjudicated Joyce as a habitual criminal, which requires only two prior felony convictions. [FN: *Joyce also contends that the district court erred in failing to give him a jury trial on the habitual criminal allegations. In light of this court's decision in Howard v. State, Joyce's argument is without merit.* 83 Nev. 53, 57, 422 P.2d 548,

1 550 (1967) (concluding that a defendant who faces adjudication as a habitual
2 criminal and the consequent life imprisonment is not entitled to a trial by jury).]

2 *Id.*

3 Joyce presented Ground 3 to the Nevada courts in his first state post-conviction proceeding.
4 ECF No. 20-10, p. 24-27. The Nevada Supreme Court analyzed the claim under *Strickland*. ECF
5 No. 21-15, p. 2-4. In denying the claim, the court stated as follows:

6 [A]ppellant claimed that counsel was ineffective for not preventing the
7 adjudication of appellant as a habitual criminal. Appellant failed to demonstrate
8 deficiency or prejudice. Appellant's claim that the State provided a certified copy of
9 only one of his prior convictions is belied by the record. [See Hargrove, 100 Nev. at
10 502–03, 686 P.2d at 225.] Although the State only had one certified copy at
11 appellant's originally scheduled sentencing hearing, the district court continued that
12 hearing, and the State provided certified copies of all six of appellant's prior
13 judgments of conviction on the continued hearing date. We therefore conclude that
14 the district court did not err in denying this claim. [FN: *To the extent that appellant
claimed that the sentencing court abused its discretion in adjudicating him a habitual
criminal, his claim was barred by the doctrine of the law of the case as this court held
on direct appeal that the district court did not abuse its discretion in doing so. Joyce
v. State, Docket No. 52213 (Order of Affirmance, May 29, 2009).* To the extent that
appellant claimed that his sentence was cruel and unusual, this claim could have
been raised on direct appeal, NRS 34.810(1)(b)(2), and was therefore procedurally
barred absent a demonstration of cause and actual prejudice, NRS 34.810(1)(b).
Appellant failed to allege cause or demonstrate actual prejudice.]

15 *Id.*

16 The Nevada Supreme Court applied the correct federal law standard to the claim. Joyce has
17 not shown that the court's application of that standard was unreasonable or that the court's
18 adjudication of the claim resulted in a decision based on an unreasonable determination of the facts.
19 Accordingly, under § 28 U.S.C. 2254(d), this court must defer to the Nevada court's denial of the
20 claim.

21 Although the state court found the claim procedurally defaulted, Joyce's IAC claim based
22 counsel's failure to challenge the sentence as cruel and unusual punishment is without substantive
23 merit. The U.S. Supreme Court has routinely held that the Eighth Amendment forbids only extreme
24 sentences that are grossly disproportionate to the crime, and does not require strict proportionality
25 between the crime and sentence. *See Ewing v. California*, 538 U.S. 11, 28–30 (2003) (upholding 25

1 years to life sentence for theft of three golf clubs imposed on defendant with long history of felony
2 recidivism); *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding two consecutive terms of 25
3 years to life for felony theft of videotapes imposed on defendant with prior felony burglary
4 convictions); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980) (upholding life sentence, with the
5 possibility of parole, imposed on defendant convicted of felony theft (for obtaining \$120.75 by false
6 pretenses), and who had prior felony convictions for fraudulent use of a credit card and passing a
7 forged check); *but see Solem v. Helm*, 463 U.S. 277, 288 (1983) (striking recidivist sentence of life,
8 without possibility of parole, because uttering a “no account” check for \$100 is nonviolent crime,
9 and defendant’s six prior felonies were relatively minor). When viewed against the backdrop of
10 these cases, the trial court’s application of the habitual criminal statute in Joyce’s case did not
11 amount to an Eighth Amendment violation. Thus, counsel was not ineffective by failing to raise
12 such a challenge.

13 Ground 3 is denied.

14 **D. *Ground 4***

15 In Ground 4, Joyce claims that he received ineffective assistance of counsel, in violation of
16 his constitutional rights, because his counsel failed to relay to him a favorable plea offer from the
17 prosecutor. ECF No. 8, p. 20-24. In particular, Joyce alleges that counsel did not inform him of a
18 “global plea offer” of five to twelve-and-a-half years to settle three criminal cases then-pending
19 against him. *Id.*

20 Joyce presented Ground 4 to the Nevada courts in his first state post-conviction proceeding.
21 ECF No. 20-10, p. 27-28. This is the IAC claim that the Nevada Supreme Court remanded to the
22 state district court for an evidentiary hearing. ECF No. 21-15, p. 4-5. In ruling upon the claim after
23 the evidentiary hearing and denial of relief by the state district court, the Nevada Supreme Court
24 addressed the claim as follows:

25 In his petition filed on April 28, 2010, appellant claimed that his counsel was
26 ineffective because he was not provided correct information about a global plea offer

1 and not informed that going to trial was a rejection of a plea offer. In support of this
2 claim, appellant attached a portion of his sentencing transcript in this case where he
3 expressed his belief that a plea offer made before trial in this case was still available
4 after trial and a portion of his sentencing transcript in a different district court case
5 wherein counsel in that case admits that he misrepresented a plea offer to be for 5 to
6 12–1/2 years, but that appellant had rejected that plea offer and that appellant had
7 rejected the actual plea offer of 5 to 20 years in the other case. Appellant appeared to
8 claim that he was offered a global plea offer that would result in a total incarceration
9 term of 5 to 12–1/2 years for his then-three pending cases.

10 The Supreme Court has recognized that defense counsel has a duty to
11 communicate formal plea offers and that to demonstrate prejudice a petitioner must
12 demonstrate a reasonable probability that he would have accepted the more favorable
13 plea offer but for counsel's deficient performance and that the plea would have been
14 entered without the State's canceling it or the district court's refusing to accept it.
Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

15 At the evidentiary hearing, the district attorney testified that at no point did
16 she ever extend a global plea offer of 5 to 12–1/2 years to any of appellant's
17 attorneys. Rather, prior to the preliminary hearing, she extended the following offer
18 in appellant's three pending cases: Appellant would plead guilty in two of the three
19 cases, stipulate to small habitual criminal treatment and terms of 5 to 20 years, the
sentences between the cases would run concurrently, and the third case would be
dismissed. The offer was never accepted and was considered rejected/withdrawn
when indictments were returned against appellant in the three pending cases. Trial
counsel in this case, Mr. Craig Jorgensen, indicated in his testimony that he never
told appellant that a global plea offer of 5 to 12–1/2 years had been made. Trial
counsel testified that he did inform appellant about a plea offer made in this case but
that appellant rejected the plea offer that was made and insisted on taking this case to
trial. [FN: *No specific testimony was elicited on the terms of the plea offer.*] Mr.
Jorgensen testified that he informed appellant that the plea negotiations would be lost
if he went forward with the preliminary hearing and trial. Trial counsel in the other
district court case, Mr. Gregory Coyer, admitted he erroneously told appellant that the
State had made an offer of 5 to 12–1/2 years but testified that appellant rejected that
“offer” and did not reconsider that “offer” until after appellant's trial was completed
in this case. [FN: *The actual offer of 5 to 20 years was made prior to the preliminary
hearings.*] Mr. Coyer testified that appellant refused to take any plea offers prior to
going to trial in this case.

20 Appellant failed to demonstrate that Mr. Jorgensen, trial counsel in this case,
21 misled him about a global plea offer. Mr. Jorgensen testified that he did inform
appellant about a plea offer in this case but that appellant rejected that offer.
22 Appellant's assertion that he did not understand that the plea offer was withdrawn is
not supported because he was informed by Mr. Jorgensen that the plea offer would be
lost if he went to trial. Nothing in the record supports appellant's assertion that he
believed he could go to trial in this case and still accept a plea offer after the trial in
this case. Despite the fact that Mr. Coyer provided misinformation, appellant failed
to demonstrate that he was prejudiced as he rejected the more favorable, but
mistaken, global plea offer. Appellant further failed to demonstrate prejudice as the
prosecutor testified that a global plea offer of 5 to 12–1/2 years had never been made

1 and the global plea that was offered in this case, 5 to 20 years, was considered
2 rejected when appellant did not accept. Thus, appellant failed to demonstrate that the
3 plea offer, based upon misinformation from counsel in a different case, would have
been agreed to by the State and allowed by the court had he tried to accept the
offer in this case. Therefore, we conclude that appellant failed to demonstrate that he
received ineffective assistance of counsel relating to a global plea offer.

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5 ECF No. 22-16, p. 2-5.

6 The Nevada Supreme Court applied the correct federal law standard to the claim. Joyce has
7 not shown that the court's application of that standard was unreasonable or that the court's
8 adjudication of the claim resulted in a decision based on an unreasonable determination of the facts.
9 Accordingly, under § 28 U.S.C. 2254(d), this court must defer to the Nevada court's denial of the
10 claim.

11 Ground 4 also contains a broad allegation that cumulative errors committed by counsel
12 undermined his constitutional right to a fair trial. Joyce does not identify, however, the particular
13 errors on which he bases the claim or how they may have combined to have a cumulative effect on
14 his state court trial. The errors alleged throughout the petition do not, for the reasons discussed
15 above, provide grounds for habeas relief.

16 Ground 4 is denied.

17 IV. CONCLUSION

18 For the reasons set forth above, Joyce's petition for habeas relief is denied.

19 *Certificate of Appealability*

20 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing
21 Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA).
22 Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the
23 issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir.
24 2002).

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1 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a
2 substantial showing of the denial of a constitutional right." With respect to claims rejected on the
3 merits, a petitioner "must demonstrate that reasonable jurists would find the district court's
4 assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484
5 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA
6 will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the
7 denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

8 Having reviewed its determinations and rulings in adjudicating Joyce's petition, the court
9 declines to issue a certificate of appealability for its resolution of any procedural issues or any of
10 Joyce's habeas claims.

11 **IT IS THEREFORE ORDERED** that the petitioner's petition for writ of habeas corpus
12 (ECF No. 8) is DENIED. The Clerk of Court shall enter judgment accordingly. The Clerk shall
13 close this case.

14 **IT IS FURTHER ORDERED** that a certificate of appealability is DENIED.

15 DATED this 9th day of July, 2018.



16
17 RICHARD F. BOULWARE, II
18 UNITED STATES DISTRICT JUDGE
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